Power, Inc. *and* United Mine Workers of America and United Mine Workers of America, Region 1 *and* United Mine Workers of America and Tire Tec. Inc. and Operators Unlimited, Inc., Single Employer, Party in Interest *and* United Mine Workers of America, AFL–CIO. Cases 6–CA–21680, 6–CA–21713, 6–CA–22177, 6–CA–22303, 6–CA–22555, 6–CA–22663, 6–CA–22854, 6–CA–23185, and 6–RC–10137

May 28, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On May 6, 1992, Administrative Law Judge Irwin H. Socoloff issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party filed cross-exceptions and supporting briefs. Thereafter, the General Counsel filed an answering brief to the Respondent's exceptions, the Respondent filed a consolidated answering brief and a reply brief to the General Counsel's answering brief, and the General Counsel filed a reply brief to the Respondent's consolidated answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt his recommended Order as modified.[2]

1. In its exceptions, the Respondent contends, inter alia, that it had no duty to bargain with the Union over its decision to subcontract the operation and maintenance of the rock trucks and graders, or its decision to subcontract its drilling operation, because these decisions were not mandatory subjects of bargaining under the test set forth in *Dubuque Packing Co*., 303 NLRB 386 (1991). We find no merit in this contention.

As we explained in our subsequent decision in *Torrington Industries*, 307 NLRB 809 (1992), the *Dubuque* test does not apply in cases factually similar to *Fibreboard Corp. v. NLRB*, 379 U.S. 203 (1964), ''in which virtually all that is changed through the subcontracting is the identity of the employees doing the work.'' In such cases, there is no need to apply any further test in order to determine whether the decision is subject to the statutory duty to bargain. The Supreme Court has already determined that it is.

Torrington Industries is controlling here. The decision to subcontract the operation and maintenance of the rock trucks and graders involved essentially the substitution of nonunit employees for unit employees to perform the same work using equipment of the Respondent that the unit employees could have operated. There was no change in the scope and direction of the enterprise. Indeed, this decision presents an even stronger case for finding a duty to bargain than the decision at issue in *Torrington Industries*, because here the subcontracting decision was based primarily on a desire to reduce labor costs.

Similarly, the decision to subcontract the drilling operation also involved the substitution of nonunit employees for those of the Respondent. Although the Respondent sold off four of its drilling rigs (two to the subcontractor and two to other companies), we find that the sale of the drilling rigs was incidental to the decision to subcontract, especially in light of the testimony of the Respondent's treasurer, Reed, that the subcontracting decision was based primarily on a savings in labor costs. In addition, the Respondent continued to mine, process, and sell coal; it did not substantially change its production process. Cf. *Eltec Corp*., 286 NLRB 890, 897–898 (1987), enfd. 870 F.2d 1112 (6th Cir. 1989) (employer's breach of its obligation to bargain over its decision to transfer and subcontract its parts assembly operation ceased as of the time it sold the parts assembly equipment, as that action resulted in a fundamental alteration of the business).

Based on the foregoing, we find, in agreement with the judge, that the Respondent violated Section 8(a)(5) and (1) by unilaterally subcontracting unit work, namely, the rock truck, grader, and drilling operations, and permanently laying off unit employees.[3]

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The General Counsel has excepted to the judge's failure to find violations of Sec. 8(a)(1) based on Supervisor Prohaska's statements in early January 1989 that General Foreman Dipko was ''gunning'' for an employee because of his union activities. We find it unnecessary to pass on this issue because the finding of such additional violations would be cumulative and would not affect the Order.

[2] In his decision the judge concluded that challenges to the ballots of the 13 laid-off employees should be overruled and counted. In his recommended Order, however, the judge ordered the election set aside. Accordingly, we shall modify the judge's recommended Order by severing the representation case and remanding it to the Regional Director to open and count the ballots and to take further appropriate action.

[3] Member Oviatt agrees that the Respondent violated Sec. 8(a)(5) and (1) by its unilateral subcontracting. He also agrees that a restoration remedy for the operation and maintenance of the rock trucks and graders is appropriate. In Member Oviatt's view, however, the situation regarding the Respondent's decision to subcontract the drilling operations and sell its drilling rigs is clearly distinguishable. As found by the judge dismissing the 8(a)(3) allegations concerning subcontracting, the Respondent had begun a reorganization program

Continued

2. Contrary to our dissenting colleague, we agree with the judge that an order requiring the Respondent to reinstate its drilling operations, as well as the operation and maintenance of its grader and trucks, is an appropriate remedy for the Respondent's unilateral subcontracting of that work. Remedial orders in general are designed so far as possible to restore the status quo ante. *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 769 (1975). When bargaining unit work has unilaterally and unlawfully been removed, whether by subcontracting or relocation, it is appropriate to order restoration of the work to the bargaining unit, unless the employer has demonstrated that restoration would be unduly burdensome. *Fibreboard Corp. v. NLRB*, 379 U.S. 203, 216 (1964); *Lear Siegler, Inc.*, 295 NLRB 857, 861 (1989). In this case there is no record evidence, and the Respondent does not contend, that restoration of the drilling work would be unduly burdensome. Cf. *Mountaineer Petroleum*, supra at 801–802, 816 (restoration of the subcontracted work would be unduly burdensome where the record contained substantial evidence supporting that finding).[4]

3. We agree with the judge that a bargaining order to remedy the Respondent's misconduct is necessary and warranted under *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). The Respondent's conduct, including repeated threats of plant closure and the unlawful layoff of 13 employees, struck at the core of the employees' organizational efforts. The seriousness of the unlawful conduct is underscored by the widespread threats made by numerous management officials to nearly all the unit employees and by the layoff of a substantial part of the unit. We are convinced that the Respondent's misconduct involves the type of severe and pervasive coercion that has lingering effects and that is not readily dispelled by time. Accordingly, we agree with the judge that an election would not reliably reflect genuine, uncoerced employee sentiment.

We also find, contrary to the Respondent's assertions, that neither the passage of time nor the turnover in management is a relevant consideration when assessing the propriety of issuing a *Gissel* bargaining order. See *F & R Meat Co.*, 296 NLRB 759 (1989). Further, even if we considered these factors, they would not require a different result. Passage of time, by itself, does not necessarily erase the lingering effects of such egregious and widespread unfair labor practices. That the two management officials who engaged in the largest number of offenses, General Foreman Dipko and Supervisor Prohaska, may no longer be employed by the Respondent would not dissipate the effects of the unfair labor practices, which were, as found by the judge, engaged in by many officials, from the highest level executives to the lowest level supervisors. Dipko and Prohaska were not the only ones to commit unfair labor practices. Threats were directly made by Production Manager Bratton, Ryan International's[5] board chairman, Hotson, and Attorney Bosch; Treasurer Reed (the second highest official on the site) stated that he intended ''to get rid'' of union supporters; Reed and President Armstrong selected the employees who were unlawfully laid off; and Wash Plant Manager Andrews unlawfully refused to rehire former employee Dillen. Furthermore, to withhold an otherwise necessary bargaining order in these circumstances would reward the Respondent for its own wrongdoing.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Power, Inc., Osceola Mills, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following for the final paragraph of the recommended Order.

''IT IS FURTHER ORDERED that Case 6–RC–10137 is severed and remanded to the Regional Director for the purpose of opening and counting the challenged ballots of John Acey Sr., John Acey Jr., Robert Adams, Charles Berg, Larry Blake, Roy Demko, Jesse Howe, Elmer Laird, Ken Noel, Keith Petrosky, Ron Petrosky Jr., Terry Petrosky, and Dave Stephens. Thereafter, the Regional Director shall prepare a revised tally of ballots. If the tally shows that the Union has won the election, the Regional Director shall issue a certifi-

in early 1988, well before any union activity, designed to bring its business into profitability, had closed departments, subcontracted portions of its operations, and laid off affected employees. The subcontracting at issue here was similarly motivated. Unlike the maintenance and operation of rock trucks, as to which the Respondent retained the ownership, the subcontracting out of the drilling operations here also entailed the sale of its equipment. The judge offered no explanation for his remedy requiring Respondent to fully restore both operations, and none is offered here. In the context of the ongoing attempt to bring the business into profitability, Member Oviatt deems an order requiring the Respondent to reinstate its own drilling operations—with the concomitant capital expenditures—while bargaining over their cessation to be unduly burdensome. Membr Oviatt therefore finds a restoration remedy as to the drilling operations to be inappropriate here. *Mountaineer Petroleum*, 301 NLRB 801 (1991).

[4] Although the record does show that the Respondent subsequently sold its drilling rigs, the record does not show that purchasing new rigs would be unduly burdensome (a proposition which our dissenting colleague assumes) or even that the purchase, as opposed to the lease, of new drilling rigs would be necessary to restore the status quo ante.

We note that under the Board's decision in *Lear Siegler*, supra at 862, ''both the Respondent and the General Counsel will have every opportunity at the compliance stage to introduce any evidence that may be pertinent to the remedy, provided of course that such evidence was not available prior to the unfair labor practice hearing.''

[5] Ryan International is the parent company of the Respondent.

cation of representative; if it shows that the Union has lost the election, the Regional Director shall set aside the election and dismiss the petition.''

Patricia J. Scott, Esq., for the General Counsel.
Frederick J. Bosch, Esq., of Philadelphia, Pennsylvania, for the Respondent Employer.
William B. Manion, Esq., of Washington, Pennsylvania, for the Charging Party Petitioner.

DECISION

STATEMENT OF THE CASE

IRWIN H. SOCOLOFF, Administrative Law Judge. On charges dated March 20 and 30 and October 17, 1989, and amendments thereto, filed by United Mine Workers of America (the Union), against Power, Inc. (the Respondent), the General Counsel of the National Labor Relations Board, by the Regional Director for Region 6, issued multiple complaints which were thereafter amended and consolidated for hearing. The complaints allege violations by Respondent of Sections 8(a)(1), (3), and (5) and 2(6) and (7) of the National Labor Relations Act (the Act). Respondent, by its answers, denied the commission of any unfair labor practices. On July 11, 1989, the Acting Regional Director for Region 6 issued an order consolidating Case 6–RC–10137 with the unfair labor practice cases for purposes of hearing, ruling, and decision with respect to the representation case issues raised by certain objections to conduct affecting the results of the election, and by certain challenged ballots.

Pursuant to notice, trial was held before me in Clearfield, Pennsylvania, on January 8, 9, 10, and 11, February 12, 13, 14, and 15, and March 20 and 21, 1990, at which all parties were represented by counsel and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Thereafter, the parties filed briefs which have been duly considered. These cases, 6–CA–21680, 6–CA–21713, 6–CA–22177, and 6–RC–10137, shall be referred to herein as the *Power I* cases.

On further charges filed by the Union against Power on December 11, 1989, March 21, April 26, July 20, and November 30, 1990, and amendments thereto, the Regional Director for Region 6 issued additional complaints, which were thereafter amended and consolidated for hearing, alleging violations by Respondent of Sections 8(a)(1), (3), (4), and (5) and 2(6) and (7) of the Act. Respondent, by its answers, denied the commission of any unfair labor practices.

Pursuant to notice, trial in Cases 6–CA–22303, 6–CA–22555, 6–CA–22663, 6–CA–22854, and 6–CA–23185 (the *Power II* cases) was held before me in Clearfield, Pennsylvania, on May 22 and December 4 and 5, 1990, and April 16 and 17, 1991, at which all parties were, again, represented by counsel and afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Following close of hearing in the *Power II* cases, all parties filed briefs which have been duly considered.

On the entire record in these cases,[1] and from my observations of the witnesses, I make the following

[1] General Counsel's unopposed motion to correct the transcript in the *Power I* cases is granted.

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Pennsylvania corporation, has a facility and place of business in Osceola Mills, Pennsylvania, where it is engaged in the business of strip mining and preparation of coal. During the months ending February 28, 1989, a representative period, Respondent, in the course and conduct of its business operations, purchased and received products, goods, and materials valued in excess of $50,000, directly from points located outside the Commonwealth of Pennsylvania, for use within the Commonwealth. I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES[2]

A. *Background*

In 1978, Power became a wholly owned subsidiary of Derek Crouch, plc, a diversified United Kingdom-based multinational corporation with coal and noncoal business activities. In 1987, Crouch and Power were acquired by another United Kingdom company, Ryan International. Ryan disposed of Crouch's noncoal divisions and, thereafter, held Crouch Mining, Ltd., a British coal company, and Power, a Pennsylvania coal company, as separate, wholly owned subsidiaries. On February 14, 1989, Disger, plc, a corporation formed by members of the Ryan International management group, effectuated a buyout of Ryan.

At least since 1978, Power has operated at a loss. In September 1987, after Ryan acquired Crouch and Power, Cris Rotson, Ryan's chairman of the board, sent Crouch's managing director, Les Nicholson, from Scotland to Pennsylvania, to study the Power operation. Thereafter, Hotson and Nicholson transferred Crouch Mining's Dan Armstrong to Power with a view toward instituting British mining methods in an effort to improve Power's performance. Armstrong joined Power in November 1987, as vice president. He became president of Power in March 1988.

Armstrong looked to reduce overheard costs, and increase coal production through institution of operating efficiencies, in order to stem the tide of losses. As a result of the operational changes which he instituted, layoffs at Power occurred throughout 1988. In March, due to an increase in wash plant efficiency, three wash plant employees were permanently laid off. In May, 16 field operation employees, including equipment operators, were laid off. Two of those employees were later recalled. In June, nine more field operation employees were laid off. Power laid off its production

[2] Respondent's motion to dismiss certain allegations of unfair labor practice conduct in violation of Sec. 8(a)(1) of the Act, as contained in amendments to the consolidated complaint in the *Power I* cases, as time-barred under Sec. 10(b) of the Act, is denied. The allegations contained in the amendments are entirely and closely related to the matters contained in the timely filed charges, arising, as they do, from the same sequence of events and involving similar conduct during the same period of time and, also, the same legal theory.

manager in August and, in October, it discontinued its blasting department, subcontracted the work, and permanently laid off six employees. On December 12, Respondent permanently closed its dry plant after instituting operational changes. As a result, four dry plant employees were permanently laid off. Power did not replace the employees laid off in 1988, nor, with one exception, did it replace the employees who resigned or were discharged during the course of that year. Likewise, employees who resigned or were discharged early in 1989 were not replaced. Despite the reductions in force, and operational changes, Power, which had suffered a net operating loss in 1987 of $235,000, saw its losses dramatically increase, for 1988, to $2 million. In the first 4 months of 1989, Power lost an additional $1 million. The continuing losses caused a cash-flow crisis.

For purposes of layoff and recall, Power utilizes a job classification seniority system, that is, selection of employees for layoff and recall is based on relative seniority within each job classification. Length of service with the Company is not considered. This method of selection was utilized throughout 1988, and caused considerable disgruntlement amount the Power employees, many of whom viewed it as arbitrary. Indeed, it was in response to the layoff of senior employees on December 12 that is, senior in terms of service time with Power, that employees John Acey Jr., his brother, Mike Acey, and Elmer Baird initiated contact with the Union, in mid-December and began an organizing drive.

In the *Power I* cases, the General Counsel contends that Respondent, in reaction to the organizing drive, threatened employees with closure and other reprisals in violation of Section 8(a)(1) of the Act; shut down all field operations for 1 week, in violation of Section 8(a)(3); temporarily laid off John Acey Jr. in violation of Section 8(a)(3); permanently laid off 13 known union supporters, in violation of Section 8(a)(3); warned employees that exercise of their Section 7 rights would be futile and would result in job loss, in violation of Section 8(a)(1), and refused to recognize and bargain with the Union in violation of Section 8(a)(5). Respondent denies that it unlawfully threatened employees and asserts that its layoff actions were taken for lawful business reasons. Respondent further denies that it was under any obligation to recognize and bargain with the Union.

In the *Power II* cases, the General Counsel contends that Respondent engaged in further violations of Section 8(a)(1); violated Section 8(a)(3), (4), and (5) of the Act by subcontracting portions of its operations, and laying off employees, for discriminatory reasons and without notifying and bargaining with the Union; violated Section 8(a)(3) of the Act by refusing to reinstate an unfair labor practice striker; disciplined and discharged employees in violation of Section 8(a)(3) and refused to rehire former employees in further violation of Section 8(a)(3). Respondent denies that it engaged in conduct violative of Section 8(a)(1) and asserts that its actions with regarding to hiring, discipline, discharge, and subcontracting of operations were lawful.

B. *Facts and Conclusions*[3]

1. The *Power I* cases

a. *The organizing drive and the alleged unlawful threats*

Acey Jr. first contacted the Union on December 13, 1988, and, thereafter, he and fellow employees Mike Acey, Elmer Laird, and Ken Noel met with the Union's International representative, Lou Maholic, on December 22. At that meeting, the employees were supplied with cards authorizing union representation and were instructed with respect to the solicitation of signatures. In the period December 22, 1988, to January 6, 1989, the date on which the representation petition was filed in Case 6–RC–10137, and the date on which Respondent received a mailgram from the Union demanding recognition. In a unit of 74, 41 employees signed authorization cards. After that date, and during the month of January, seven more employees signed cards.

Employee Robert Dillen testified that, in late December 1988, the production equipment manager, William Bratton, an acknowledged statutory supervisor, told the maintenance department employees that there would be people coming around to ask them to sign union cards. Bratton told the employees that, if the Union were put in at Power, the Company would close. Dillen's testimony in this regard was corroborated by employee Allen Legrand. Bratton, in his testimony, denied that he threatened the employees with closure if they opted for union representation. As Legrand and, particularly, Dillen, impressed me as honest and forthright witnesses, and as Bratton, considering his demeanor as a witness, did not so impress me, I find that the conversation occurred as described by the employees. I conclude that, in late December 1988, Respondent, through Bratton, threatened employees that Respondent would close its operations if the employees selected the Union to represent them, in violation of Section 8(a)(1) of the Act.

Employee Ken Noel testified that, late in December, he was informed by statutory supervisor Pete Prohaska that Respondent's general foreman, Larry Dipko, had stated that, if the Union came in, the Company would shut its doors, buy coal in Pittsburgh, and run it through Respondent's wash plant. Later that day, Noel testified, Dipko confirmed Prohaska's statement, telling Noel that England had told Power that they were going to close the doors at Power if the employees brought in the Union, buy coal in Pittsburgh, and run it through the wash plant. Prohaska, in his testimony, initially denied telling employees that Power would shut down if the Union came on. He conceded, however, that he did make such a statement to fellow Supervisor William Mowe, and that he ''might have'' also made that statement to others. Dipko testified that he did not have any conversations with Noel concerning what would happen if the Union came in. I found Noel a convincing witness, while Prohaska testified in a vague manner and displayed an uncertain memory of events. Dipko did not impress me as a truthful witness. Based on Noel's testimony, I conclude that, late in De-

[3] The factfindings contained herein are based on a composite of the documentary and testimonial evidence introduced at trial. Where necessary to do so, in order to resolve significant testimonial conflict, credibility resolutions have been set forth, infra.

cember 1988, Respondent, through Prohaska and Dipko, threatened employee Noel that Respondent would close its operations if the employees opted for union representation, in violation of Section 8(a)(1) of the Act.

Acey Jr. testified that, on or about January 2, 1989, he received a telephone call from Supervisor Prohaska. According to Acey, Prohaska asked him not to go through with the organizing drive, as the Company would shut down if the employees tried to organize. Acey stated that the employees were too far into it to back out; that it was out of Acey's hands and that a representation petition, imminently, would be filed with the NLRB. Prohaska stated that, probably, they would all be out of work. During this conversation, or at an earlier time, Acey asked Prohaska to sign an authorization card, and Prohaska declined to do so. Prohaska, in his testimony, stated that the telephone conversation with Acey occurred in late December, and not in January. According to Prohaska, the call was placed by Acey Jr. and, during the conversation, Acey asked Prohaska to sign a card, and Prohaska said that he would get back to Acey. About 15 minutes later, Prohaska testified, when he was unable to reach Acey Jr. by telephone, he called Mike Acey and told him that he wanted nothing to do with the Union. Prohaska further testified that he reported the card solicitation matter to Dipko. I have, previously, found Prohaska an unreliable witness. Acey Jr., on the other hand, throughout his lengthy testimony, described events in a detailed, comprehensive, and believable manner and I found him a thoroughly credible witness. I accept his version of the telephone conversation with Prohaska and find that it occurred, as Acey testified, on or about January 2, 1989. I further find that, during the conversation, Prohaska told Acey that the Company would shut down if the employees tried to organize. I conclude that, by Prohaska's remarks, Respondent again threatened the employees with closure if they sought union representation, in violation of Section 8(a)(1) of the Act.

According to the uncontradicted and credited testimony of employee Robert Adams, Dipko, late in 1988, or early in 1989, told Adams and employee Dave Miles that Dipko had heard that the Union was coming in. Dipko further stated that, if the Union came in, Power would ship its equipment back to England, and close down. Based on Adams' testimony, I find and conclude that Respondent, by Dipko, violated Section 8(a)(1) of the Act by this further threat of closure.

Employee Roy Demko testified that, on January 9, 1989, he had a conversation with General Foreman Dipko. Demko asked Dipko how things looked for Power as Demko was interested in purchasing a new truck. According to Demko, Dipko replied, stating that, if the Union came in, they would shut Power down. Dipko did not testify about this alleged conversation. He did state, in his testimony, that he did not talk to any employees about the Union after being so instructed, by counsel, sometime in January or February. As Demko testified in a believable manner, and as Dipko's testimony, even taken at face value, does not fully amount to a denial, I credit Demko. I find and conclude that, on January 9, Respondent, by Dipko, violated Section 8(a)(1) of the Act by threatening an employee with closure if the employees chose representation by the Union.

According to the uncontradicted and credited testimony of former employee David Danko, Supervisor Prohaska, in early January 1989, told Danko to warn his fellow employee, Mike Acey, to watch his step, as Larry DiPko was gunning for him because of his union activities. Prohaska, according to the uncontradicted and credited testimony of Mike Acey, then delivered that warning to Acey, directly.

Employee Dave Stephens testified that, in mid-January, he and fellow first-shift employee Robert Ryver were approached by Dipko. Dipko stated that he did not know what work the second-shift employees had done the night before, and that it did not look like they had done anything. Dipko added that he had heard that the employees were saying that they did not have to work hard anymore, since the Union was around. According to Stephens, Dipko then stated that he, Dipko, would tell Power's president, Armstrong, that ''he might as well just close it up and go back to England if the guys were going to be that way,'' that is, ''wanted the Union.'' Dipko testified that he did not recall such a conversation. As Stephens testified in a believable manner, and as I have previously found Dipko to have been a less than candid witness, I find that the incident occurred substantially as described by Stephens. I conclude that, in mid-January, by General Foreman Dipko, Respondent, in violation of Section 8(a)(1) of the Act, issued a thinly veiled threat of closure in response to employee union activity.

Theresa Cantolina, who served as Respondent's office manager until October 31, 1989, credibly testified that, in December 1988, or January 1989, Derek Reed, Respondent's treasurer and second highest ranking on-site official, told her that he felt that the instigators of the employee union activity were employees John Acey Sr., John Acey Jr., and Mike Acey. Reed said that the Aceys were troublemakers. Also in that time period, Reed told Cantolina that he would get rid of the union supporters. Dipko told Cantolina, according to her testimony, that he would fire Mike Acey because he was a troublemaker who had instigated the whole union matter. In July, Crouch's managing director, Nicholson, told her that there would never be a union at Power; they would shut it down before they would let that happen.

On January 24, 1989, the Board conducted a representation case hearing in Case 6–RC–10137, attended by Respondent's president, Dan Armstrong. Acey Jr. testified for the Union. Pursuant to a Decision and Direction of Election issued by the Board's Regional Office on February 24, 1989, an election was scheduled for March 23. On March 10, Respondent laid off 13 known union supporters.

Employee David Farabaugh testified that, on March 21, 1989, Prohaska informed Farabaugh, and fellow employees Forrest Shepherd, Ken Bratton Jr., and Larry Foster, that Dipko had stated that, if the Union got in, the 13 employees laid off on March 10, would return to work and take the jobs of the employees then working. Prohaska, in his testimony, stated that he did not recall having had any such conversation. As Farabaugh impressed me as a truthful witness, and as I have previously found Prohaska's testimony unreliable, I find that that the conversation occurred as described by Farabaugh. I conclude that, on March 21, Respondent, through Prohaska, violated Section 8(a)(1) of the Act by threatening employees with reprisals if they should opt for union representation.

Also on March 21, Ryan's chairman of the board, Cris Hotson, conducted two meetings of employees. Farabaugh, who attended the early meeting, for the first-shift employees,

testified that Hotson stated that he expected the employees to vote ''no'' and that he, Hotson, would be very upset with them if they voted ''yes.'' Referring to the employees laid off on March 10. Hotson said that they were trying to put the Company on strike and, further, that they were past history; they would never be back to work at Power. Prohaska, who also attended this meeting, did not recall that Hotson mentioned the 13 laid-off employees. As Prohaska exhibited a less than clear recollection of the meeting, and as Farabaugh testified in a detailed and believable manner, I credit the employee's version of events at the meeting.

With respect to Hotson's March 21 meeting, with the second-shift employees, employee Jonathan Wisor testified that Hotson stated that 20 percent of his mines in the United Kingdom were organized and, in one case, when he was unable to reach agreement with the Union, he shut the jobsite down. Hotson added, according to Wisor's testimony, that, eventually, any union would put a company out of business. Wisor's testimony was, in material respects, corroborated by employee Jim Keith. Dipko, who also attended the second meeting, testified that Hotson asked employees for support. Dipko did not dispute, specifically, the accounts of the meeting offered by Wisor and Keith.

Wisor and Keith impressed me as truthful witnesses and I accept their accounts of the second March 21 meeting, as true. Hotson's comment, that he had shut down an organized British minesite when he was unable to reach agreement with a union, and his further comment that, eventually, any union would put a company out of business, must be viewed in the context in which they were uttered. Respondent, since inception of the employees' organizing drive, had repeatedly threatened to close the facility if the employees brought in the Union. In such a setting, Hotson's statements reasonably cannot be viewed as other than a thinly veiled restatement of the earlier threats. I conclude that Respondent, by Hotson, on March 21, again threatened the employees with a close of operations should they select representation by the Union, in violation of Section 8(a)(1) of the Act.

b. *The shutdown of operations for the week, January 3 through 9, 1989*

At Respondent's wash plant, the coal which is extracted at the Power field sites is cleaned, processed, and readied for market. In January 1988, Power modified the plant by installing an ITN system, a fine coal recovery system designed to increase the amount of coal recovered, and enable Power to salvage coal which, previously, could not be processed. After the installation, the wash plant operated at low capacity, and further modifications to the system were required. As this occurred at a time when Power was experiencing a cash flow problem, it decided to shut down field operations for 2 weeks, and lay off all field employees.[4] The wash plant employees were not laid off; they worked at making repairs and modifications to the system.

In mid-December 1988, the barrel in the vacuum filter of the new system failed. It was removed and shipped out for repair, halting normal wash plant operations. In order to meet its contractual obligations to sell coal, Power first blended dry screened coal with that previously run through the wash plant. Simultaneously, it modified its piping arrangement to wash coal by utilizing water from surface ponds, with the resultant slurry material placed in an equalization pond. This process was only effective with certain coals.

Moreover, only a limited amount of slurry could be discharged into the equalization pond without running afoul of regulations promulgated by the Pennsylvania Department of Environmental Resources. Power washed coal in this manner during the last 2 weeks of December, until the equalization pond was full and it ran out of coal which could be processed in that way.

Based on the original estimates which it had received, Power had anticipated that the barrel would be returned by the end of December. It was not. On the morning of January 3, 1989, Armstrong testified, faced with a cash flow crisis caused by the huge operating losses sustained in 1988, unable to raise funds, uncertain when the vacuum filter barrel would be returned, unable to process mined coal for market, Power decided temporarily to shut down all operations in order to conserve cash. The employees were so advised, when they reported for work on the morning of January 3, by General Foreman Dipko and Wash Plant Manager Jeff Andrews.

Thursday, January 5, was a payday. Some 30 to 40 employees reported to Respondent's premises to receive their checks, and approximately 19 or 20 of them were wearing union hats. Local television newscasters were present at the gate, and they conducted an interview with Acey Jr. When he entered the premises, Acey Jr. told Dipto that TV 10 Action News wanted a statement from him, and Dipko said that he would not make a comment. Dipko told the employees to report back to work on Monday, January 9, and Respondent resumed operations on that date. Returning wash plant employees performed maintenance work for several days and, then, returned to their normal work on return of the repaired barrel.

As of January 3, 1989, when the shutdown occurred, the organizing drive was several weeks old. By the unlawful statements issued by Supervisors Dipko, Bratton, and Prohaska, Respondent had demonstrated its awareness of its employees' union activities, and its overwhelming antipathy toward same. The temporary shutdown was sudden, without warning, and came amid Respondent's threats permanently to close operations if the employees brought in the Union.

Nonetheless, I conclude that the January 3 through 9, 1989 shutdown was not in violation of the Act, as Respondent has shown that it would have taken that action in the absence of protected activities by its employees. The uncontradicted record evidence shows that, when Respondent resorted to the temporary shutdown, it was no longer able to process coal by alternate means, and was uncertain when the missing barrel would be returned so that it could resume normal wash plant operations. It faced a cash crisis, caused by the huge operating losses incurred in 1988, rendering prohibitive the cost of mining coal which it could not process and sell. Respondent's actions were consistent with its past practices which preceded the onset of employee union activities. In these circumstances, I conclude that the shutdown was prompted by business concerns not union concerns, and was not violative of the Act.

[4] Coal, which is mined but cannot be processed, is stockpiled—it cannot he sold. Obviously, to incur the costs of mining such coal exacerbates the cash-flow problem.

c. *The January 9 temporary layoff of John Acey Jr.*

On January 9, 1989, the engine on a 380 B.E. dragline blew up, rendering it inoperable[5] With a dragline used by employees on two shifts so idled, Power laid off its two most junior dragline operators, Keith Petrosky and Terry Petrosky, and its two most junior dragline oilers, Glen McClosky and John Acey Jr.[6] When advised of the layoff by Supervisor Bratton, Acey Jr. stated that Bratton could tell Power's president, Dan Armstrong, that ''this damn place will be union, or we'll get rid of it.'' Acey Jr. and Terry Petrosky were recalled to work on January 12.

The General Counsel does not contend that the layoffs of McClosky and the Petroskys were violative of the Act. In claiming that the Acey Jr. layoff was for unlawful reasons, General Counsel points to the overwhelming hostility displayed by Respondent toward the union activities of its employees, in general, and toward the activities of Acey Jr. in particular. In this connection, I note that it was in this time period that Treasurer Reed told Office Manager Cantolina that the Aceys were the instigators of the union activities and that he, Reed, would get rid of the union supporters. Nonetheless, Respondent has shown that the layoffs would have occurred in the absence of protected activities. The precipitating cause was a sudden and unexpected loss of the use of equipment. The established system of selection for layoffs, seniority within the affected job classifications, was utilized. Acey Jr.'s layoff meaningfully cannot be distinguished from the concededly lawful layoffs of McClosky and the Petroskys. I conclude that Respondent did not violate the Act by its temporary layoff of Acey Jr. on January 12.

d. *The permanent layoff of 13 employees on March 10, 1989*

Beginning January 9, 1989, many if not most of the field employees were observed by management officials wearing and displaying union insignia—hats, buttons, and stickers—at work. In this connection, Acey Jr., on several occasions, assisted by employees Larry Blake, Ron Petrosky Jr., and Dave Farabaugh, was seen by Supervisor William Bratton passing out those objects, bearing the United Mine Workers logo, at Power's gates. Starting March 6, several employees, including Bob Adams, Ken Noel, and Elmer Laird, placed signs on the windshields of the vehicles which they drove to work, seeking support for the Union. On March 8, Acey Jr., accompanied by Mike Acey and Larry Blake, hand-delivered letters to President Armstrong and Treasurer Reed, from the Union, challenging Power to a preelection debate. On March 10, Respondent permanently laid off 13 employees, in various job classifications, all of whom had signed union authorization cards—John Acey Sr., John Acey Jr., Robert Adams, Charles Berg, Larry Blake, Roy Demko, Jesse Howe, Elmer Laird, Ken Noel, Keith Petrosky, Ron Petrosky Jr., Terry Petrosky, and Dave Stephens. There is record evidence that at least 10 of those employees—Acey Sr., Acey Jr., Adams, Blake, Howe, Demko, Laird, Noel, Ron Petrosky Jr., and Stephens—wore and/or displayed union insignia at work.

Since inception of the organizing drive, and until the eve of the March 23 election, Respondent's officials, from its highest level executives to its lowest level supervisors, made clear to the employees that Power would close its operations if the employees selected the Union to represent them. The treasurer, Reed, informed Power's office manager that Respondent would ''get rid of'' the prounion employees. On March 10, 2 weeks before the election, 13 employees, all of them supporters of the Union, were suddenly terminated. Included in this group were employees whom Respondent knew were among the leading union activists. To say that the General Counsel has established a strong prima facie showing of massive unlawful discharges is to understate the case.

Armstrong testified that, late in 1988 and in January and February 1989, in an effort to turn around an increasingly unprofitable operation, Respondent, with the assistance of Crouch Mining and Ryan officials, developed a new mining plan. Respondent decided to concentrate production in those areas which offered a better ratio of coal recovered to overburden or dirt which had to be removed in order to recover the coal. It was also decided to introduce new and heavier equipment and, concurrently, to reduce staff. In this connection, Armstrong testified, Respondent decided to discontinue use of its 35- to 50-ton capacity rock trucks, or end dumps, which were used to haul removed overburden, and to replace them with rock trucks with a capacity for hauling 100 tons of material. These new 100-ton rock trucks, which were obtained from Crouch Mining, began arriving on site in January and February, but were not operational until March. By mid-February, Respondent had also decided to obtain, through lease arrangement with Crouch Mining, an O & K shovel, which has greater dirt removal capacity than a dragline or a D-Mag, then in use by Respondent. Power did not actually receive the O & K until mid-May. Between February 28 and March 2, Armstrong testified, the foregoing plans were finalized and, in conjunction therewith, Armstrong was instructed by British officials to terminate 13 employees, primarily on the expectation that use of the new and larger equipment would result in a need for fewer employees. Selection of employees for dismissal was left to Armstrong, who was assisted in that regard by Reed. Permanently laid-off were one driller (Demko); two dragline oilers (Acey Jr. and Stephens); three dozer operators (Laird, Noel, and J. Howe); two loaders (Berg and Ron Petrosky Jr.); two B.E. dragline operators (Terry Petrosky and Keith Petrosky) and three 35-to 50-ton rock truck operators (Acey Sr., Blake, and Adams). In this latter connection, it is important to note that, until the layoffs, Respondent employed eight 35-to 50-ton rock truck operators and, under its new mining plan, it intended to employ an equal number of operators, eight, to run the 100-ton rock trucks. However, rather than simply having the eight existing operators run the new trucks, Power chose to lay off the three most junior rock truckdrivers (Acey Sr., Blake, and Adams), and to fill the slots with three employees that it transferred from the equipment maintenance department because, Armstrong testified, he wanted the maintenance and repair ability of those employees. Ostensibly, Respondent followed the established method of layoff by classification seniority in effectuating its March 10 action.

[5] After investigation, Respondent, on January 12, discharged the dragline operator, David Danko, the oiler, Mike Acey, and the lubeman, Rodney Brown Jr., for negligence.

[6] In his testimony, Acey contended that two other oilers, not laid off, were junior to him, namely, Jeff Ralston and Mike Gregg. However, Ralston worked in a separate oiler classification, while Gregg was classified as an equipment (dozer) operator.

Respondent urges that the March 10 layoffs be seen as an effectuation of an urgently needed new mining plan. It argues that the timing of the layoffs, 2 weeks before the election, was coincidental, as Power needed to take action when it did. In Respondent's view, the layoff action was but a continuation of the layoff program begun in early 1988, and Respondent contends that, as in 1988, it adhered to the principle of layoff by classification seniority. For the reasons stated below, I reject Respondent's argument that the layoffs were the product of business judgments, uninfluenced by union considerations, and find and conclude that they occurred in response to the employees' organizational activities.

As noted, Respondent's threat to close its operation if the employees selected the Union to represent them was repeated throughout the course of the union campaign. Its second highest ranking onsite official stated that Power would ''get rid of'' the union supporters, and he singled out the Aceys as the ''instigators'' of the organizational drive. In these circumstances, the sudden, massive layoff of 13 union supporters, including the Aceys and others known by Respondent to be particularly active and vocal on behalf of the Union, 2 weeks before the election, is not easily explained. Moreover, the new mining plan notwithstanding, Respondent has not set forth a clear explanation of why it acted when it did. In this connection, it is significant that the O & K shovel, one of the key ingredients of the new plan, did not arrive on site until 2 months after the layoffs.

There are factors in addition to animus and timing that convince me that the layoffs were unlawfully motivated. Thus, the record evidence reveals that the process of selection of employees for layoff, while supposedly governed by classification seniority, was, in fact, dictated by other considerations. As noted, Respondent chose to lay off three experienced 35-to 50-ton rock truck operators, including Acey Sr., and, then, to transfer three employees from the mechanic classification to the new 100-ton rock truck ''operator/mechanic'' classification, assertedly because of the maintenance and repair ability of those employees. Yet, the uncontradicted record evidence establishes that, after the transfers, which did not occur until April, those employees worked as drivers, only, and they performed no maintenance or repair work. In the weeks before the layoff, Respondent transferred one of its most junior dozer operators, Ken Bratton Jr., to the position of grader operator, to meet a temporary condition. Bratton, who did not sign an authorization card, was chosen for the transfer despite the fact that, several weeks earlier, Dipko had asked the more senior dozer operator, Laird, if he would accept such a transfer, and Laird had responded, affirmatively. In his testimony in this proceeding, Armstrong conceded that one of the considerations in the Bratton transfer decision was to avoid having to lay him off as a junior dozer operator. While Laird, thus, remained a dozer operator, he would still have avoided layoff, under the classification seniority system, had his classification seniority date been left in tact. However, immediately prior to the layoff, Respondent ''discovered'' that, for classification seniority purposes, Laird had been credited with time earlier spent operating a dozer at the tipple, as well as for the time he spent operating the same piece of equipment in the field. On this basis, Laird's classification seniority date was altered, and he lost service credit for the time spent operating a dozer at the tipple, despite the lack of difference in the equipment operated there, and in the field. Had this charge not been made, Laird, one of the originators of the organizational drive, would have maintained his standing as a senior dozer operator, and would not have been laid off.

There is another important reason to reject Respondent's argument that the March 10, 1989 layoffs were but a continuation of the layoff program begun in 1988. The employees laid off in 1988 were, uniformly, not replaced. The employees laid off on March 10, 1989, at least many of them were, in fact, replaced, beginning the following month. Thus, starting in April, and continuing through December, when, as detailed hereinafter, Respondent subcontracted the rock truck operation, a stream of employees of Crouch Mining, as many as seven to nine at a time, arrived on site and engaged in production work, including the operation of the rock trucks, O & K shovel, dozers, and all of Power's heavy-duty equipment. While Respondent argues that these individuals were not replacement workers but, rather, were brought in to ''train'' Power's employees on the operation and maintenance of the 100-ton work trucks, and the O & K shovel, the record is replete with evidence that this is not how they spent their time. Rather, there is ample record evidence showing that, what training Power's employees received with respect to the new equipment, consumed but a matter of hours and, for the most part, even that training was not supplied by the British ''visitors'' who were busily engaged in production tasks. Indeed, despite Respondent's contention that the operation and maintenance of ''new and different'' pieces of equipment required extensive training of the employees assigned to those tasks, Respondent, in December, subcontracted the operation and maintenance of its 100-ton rock trucks to a business enterprise which had had no previous experience with that equipment.

In light of Respondent's repeated threats to close its operation in response to the employees' union activities; its stated intent to rid itself of union adherents; the timing of the permanent layoffs of 13 union activists, 2 weeks before the election; the demonstrated manipulation of the layoff by classification seniority system and the fact that many of the laid-off employees were, soon thereafter, replaced, I conclude that the layoffs occurred for discriminatory reasons and that Respondent has entirely failed to show that the layoffs would have occurred in the absence of protected activities. I conclude that the 13 employees permanently laid off on March 10, 1989, were laid off, or discharged, because of their union activities, in violation of Section 8(a)(3) of the Act.

e. *Further alleged unlawful threats*

Armstrong left Power and returned to the United Kingdom several days after the March 10 layoffs. In April, Crouch Mining Contracts Engineer John McBean arrived onsite and, in August, he became, in fact, if not in title, Power's onsite chief executive officer. In August and September, the employees discussed among themselves the possibility of calling a strike.

Late in September, Respondent's attorney, Frederick Bosch, accompanied by McBean and General Foreman Dipko, entered Respondent's premises and held small group meetings with the employees. William Howe, an acknowledged statutory supervisor, attended one of the meetings, along with employees Tim Gray, Dan Merritt, and Bob Ralston. According to Howe's testimony, Bosch told the em-

ployees that, if there were a strike, the Company would continue to operate, and the people who went on strike would be replaced. Referring to the then impending unfair labor practice case hearings, Bosch said that it ''is going to be a long drawn-out affair.'' Bosch further told the group that anyone caught helping the 13 employees laid off on March 10 ''will be out there looking for help from somebody else.''[7]

Employee Dillen testified about another such meeting, also attended by employees Roy Prentice, Rick Long, and Dave Miles. According to Dillen, Bosch stated that the Board's decision regarding the 13 laid-off employees would be appealed. Further, if the Board won the case at the hearing stage, there would be a further appeal. Employee Prentice raised the possibility of a strike. Bosch said that, if the employees went out on strike, it would be called an unfair labor practice strike, but the Company would term it an economic strike. Either way, Bosch stated, striking employees would be replaced and, ''in the end,'' the employees ''could fight for our jobs'' and ''might win 3 or 4 years down the road.'' Dillen stated that the money spent on Bosch could better be spent calling back some of the laid-off employees. Bosch responded, stating that the ''fucking thirteen guys ain't coming back.'' Employee Long also testified about this meeting. Although his recollection was limited, Long did confirm Dillen's testimony that Bosch informed the employees that the 13 men laid off on March 10 were not coming back.

At a third meeting, Bosch addressed employees Allen Legrand, Forrest Shepherd, Larry Foster, and Edmund Kantowski. Legrand testified that Bosch stated that he could make the proceedings drag on. When employee Shepherd asked what would happen if there were a strike, Bosch stated that striking employees would be replaced. Legrand then asked what would happen if the strike were an unfair labor practice strike. Bosch replied, asking ''who's to say its an unfair labor practice strike?'' He then related to the employees the facts of a prior case, in which a group of employees struck for 3 years only to lose their jobs when he, Bosch, proved that the strike was not an unfair labor practice strike. Employee Foster also testified about this meeting. According to Foster, Bosch told the employees that the Board proceedings could drag on for several years and, in response to an employee's question about an unfair labor practice strike, stated that strikers would be replaced.

McBean, in his testimony, confirmed the fact of the foregoing meetings. According to McBean, Bosch told the various employee groups that the then impending unfair labor practice hearing would not produce an immediate result and, as the losing side could appeal, the entire process could take 2 years. In response to employee questions, Bosch explained the difference between an economic strike and an unfair labor practice strike, and stated that, if there were a strike, the Company would continue to operate with replacement employees. McBean testified that he could not recall any discussion at the meetings concerning what would happen to individuals who helped the 13 laid-off employees. However, he conceded that Bosch told Dillen that ''the 13 men are not coming back.'' Dipko, in his testimony, stated that, at the meetings, Bosch explained to the employee groups the difference between an unfair labor practice strike and an economic strike and stated that, what they might view as the former might later be found to be the latter. Dipko could not recall any statement by Bosch concerning what would happen to individuals who aided the 13 laid-off employees.

In assessing the testimony concerning the group meetings conducted by Bosch in late September 1989, I have accorded particular weight to the testimony of William Howe, in light of his supervisory status at the time that he testified and the overall impression I formed, as I observed him testify, of his candor as a witness. I have previously found that Dillen and Legrand were honest and forthright witnesses, and their testimony concerning the September meetings was convincing. On the other hand, McBean and Dipko were vague in their descriptions of the September meetings, and where their testimony differed from that of Howe, Dillen, and Legrand, it has not been accepted.

Based on the testimony of Howe, Dillen and Legrand, I find that, at the September meetings, Respondent, through Bosch, informed the employees that the Board proceedings would be a long drawn out affair; if the employees engaged in an unfair labor practice strike they would have to fight to get their jobs back, and, even if they were successful, the fight could take 3 or 4 years; the 13 employees laid off on March 10 were not coming back; anyone caught helping them ''will be out there looking for help from somebody else,'' that is, will be discharged. By the foregoing statements, Respondent, in violation of Section 8(a)(1) of the Act, warned its employees that exercise of their Section 7 rights would be futile and would result in job loss.

f. *The refusal to bargain*

(1) Unit composition

In his Decision and Direction of Election dated February 24, 1989, the Acting Regional Director found the following unit appropriate:

> All full-time and regular part-time production and maintenance employees including oilers, end dump operators, wash plant operators, assistant wash plant operators, partsmen, drillers, loader operators, dozer operators, dragline operators, mechanics, service employees, mechanic operators, electricians, chemists, coal loader operators, scalesmen, purchasing employees, mechanic trainees, operators, welders, utility operators, sample/loader operators and grader operators, but excluding engineers, the safety employee, office clerical employees, guards, professional employees and supervisors as defined in the Act.

Respondent contends herein that an appropriate unit for purposes of collective bargaining must include the two engineers, the safety employee, and the four clerical employees.

The clerical employees, Jennifer Lumedue, Judy Matia, Michelle Matthews, and Justine Reed, are supervised by the office manager who, herself, reports directly to Treasurer Reed. Prior to December 1988, they performed their duties in an office located some 3 miles from the mining site. However, at the direction of Ryan's chairman of the board, Cris Rotson, they were moved, in December 1988 to an office trailer at the tipple, so as to be close to the production units.

[7] At that time, the Union was soliciting contributions to a hardship fund for the benefit of those employees.

The clerks perform routine office functions—typing and filing—process the payroll, process unemployment and worker's compensation forms, handle licensing and royalty documents, keep track of production figures, record machine hours, process invoices, and pay bills. These employees have access to confidential information, including personnel files and financial records. Prior to the filing of the representation petition, none of the clericals had performed any production work. However, in late February each of them was required to work for 1 day in the scale house, weighing trucks. Also in February, Respondent, for the first time, scheduled safety classes for the clericals; however, not all of them attended.

The clericals have direct contact with the field employees on those occasions when a field employee has a question concerning pay, insurance, or compensation. They also have occasional interaction with the weigh master, concerning production figures, and the purchasing agent, concerning purchase orders and shipping. There are times when the clerks leave their separate trailer and visit the administration trailer, the engineers' trailer, the records trailer, and the scales/purchasing building.

While the vast majority of the production employees are hourly paid, the clericals are salaried, and they are not paid for overtime work. Unlike the production employees, the clericals receive paid sick leave, can anticipate vacation time, and can take their vacations when desired. They work on a 7-hour day, 5-day-per-week schedule, with an hour each day for lunch. While production employees are required to wear a uniform, the clericals were not required to do so until February 1989, when they were issued lab coats and shoe-type boots.

The clericals are separately located, separately supervised, have only incidental contact with the field employees, are salaried, work standard office hours, receive sick leave, can anticipate vacation time, and spend their time performing routine clerical duties. I conclude that they are, essentially, office clerical employees who do not share a sufficient community of interest with the production and maintenance employees to warrant their inclusion in the unit.

The safety director, Harry Kanour, has an office located in an onsite trailer, which he shares with the engineers. He is salaried, does not receive overtime pay, wears a uniform, and reports directly to Respondent's onsite chief executive officer. Ranour does not have a formal educational background in the mine safety field, but did attend a 40-hour training class conducted by the Mine Safety and Health Administration (MSHA), which is supplemented, every 18 months, by refresher courses.

Ranour is responsible for all onsite safety-related matters. He arranges safety training for new employees and conducts annual safety classes for experienced employees and, also, for supervisors. Kanour accompanies MSHA inspectors on tours of the minesites, and reports their findings. He also conducts his own minesite inspections, and has authority to direct employees to correct safety problems that present an imminent danger. Kanour, too, is responsible for ensuring Respondent's compliance with the regulations promulgated by the Pennsylvania Department of Environmental Regulations (DER), and, in this connection, too, he performs onsite inspections, and issues instructions to employees. Kanour is able to operate certain of Respondent's heavy equipment and, in cases of emergency, related to safety or environmental matters, has done so.

Kanour acts as Respondent's representative at all meetings with Federal (MSHA) and state (DER) authorities. He has also attended Respondent's management meetings to discuss safety and environmental issues.

While Kanour has direct daily contact with the field employees, his duties bear little relation to the production of coal. Rather, his time and efforts are spent, exclusively, on matters pertaining to compliance with Federal safety laws and state environmental regulations. He is salaried, works out of an office, and reports directly to the onsite chief executive officer. The duties which he performs, and the skills which he utilizes, are dissimilar to those of the employees included in the unit. I conclude that he does not share a sufficient community of interest with them to warrant his inclusion in the unit.

The engineers, Ron Krise and Richard Liptak, as noted, have an office in an onsite trailer, which is also utilized by Kanour. They are salaried, do not receive overtime pay, and wear coveralls, a uniform shirt and steel-toe shoes to work. Neither Krise nor Liptak has had any formal education beyond high school. They do not possess, nor are they pursuing, a degree in engineering, and they have no educational background in surveying. Nor did they participate in a formal apprenticeship program. Rather, they received on-the-job training from professional engineers who were previously employed by Respondent. It is not contended herein that they are technical employees.

Krise and Liptak report to the onsite chief executive officer. They arrive at work at 7 a.m., 1 hour later than the production employees, and spend 60 to 70 percent of their worktime surveying the pit areas to determine the amount of coal being mined, and to measure and mark the mining area so as to maintain a straight highwall and conform mining to the limitations imposed by state mining authorities. In the performance of these duties, the engineers utilize a surveyor's instrument. They do not operate heavy equipment. Krise and Liptak communicate with the field employees working in the pit areas, for safety reasons, by hand signals, on]y. The remaining 30 to 40 percent of the engineers' worktime is spent working in their office, compiling reports, and prospecting for future mining sites. In this later connection, they locate prospect holes and mark their location on a map. They use spray paint to mark the lines for the construction of a road or the establishment of a highwall. While Krise and Liptak perform the foregoing duties, field employees are often in the area, usually performing other work. In fact, the engineers generally convey their instructions concerning how an area is to be worked to the supervisors, rather than directly to the field employees.

As Krise and Liptak are salaried, report directly to the onsite chief executive officer, do not operate heavy equipment, spend much of their time in an office, have no meaningful interaction with the field employees, and utilize dissimilar skills, they do not share a sufficient community of interest with Respondent's other employees to warrant their inclusion in the unit. I so find and conclude.

(2) Majority status

As earlier noted, by January 6, 1989, a majority of the unit employees, 41 of 74, had signed single-purpose cards des-

ignating the Union as their collective-bargaining representative. Thereafter, in the month of January, seven more employees signed such cards. Respondent challenges the validity of five of the cards signed on or before January 6 (those of Dave Farabaugh, Dan Merritt, Jim Eirich, Allen Legrand, and Larry Foster), and of five cards signed on January 8 (Robert Dillen, Howard Kitko, John Kitko, Albert Legrand, and Rick Long).

Farabaugh's signed card was solicited by Acey Jr. Farabaugh testified that, during the course of the solicitation, Acey Jr. stated that the purpose of signing the card was to authorize the Union to represent the employees. Acey Jr. did not discuss an election. Nonetheless, because Farabaugh further testified that he entertained the belief that there would be an election at some point, Respondent urges that the card be discounted. As the card unambiguously designates the Union as exclusive collective-bargaining representative, and as Farabaugh was not told anything at odds with the wording of the card, I reject Respondent's argument and find that the card is valid, and should be counted.

Respondent's challenge, to the card purportedly signed by Dan Merritt, is based on the failure of General Counsel to call Merritt as a witness to authenticate the card. Rather, General Counsel introduced the card through the testimony of the solicitor, John Acey Jr. In this latter connection, Respondent urges that the card be rejected because neither Acey's pretrial affidavit, nor his personal diary, contained reference to the Merritt card. These arguments do not raise substantial issues, and they are rejected. I find that General Counsel has met her burden, and established the authenticity and the validity of the Merritt card, and that the card should be counted.

The cards signed by Jim Erich, Allen Legrand and Larry Foster were solicited, respectively, by Acey Jr., Mike Acey, and Elmer Baird. In each case, Respondent contends, the solicitor misrepresented the purpose of the card. Eirich testified that he was told by the solicitor, Acey Jr., that the purpose of the card was to ''get the union in to represent the men there at Power.'' Eirich further testified that Acey Jr. also stated that the purpose of signing the card was to get an election. Allen Legrand testified that the solicitor, Mike Acey, did not tell him what the purpose of the card was, and he, Legrand, did not ask. Rather, Legrand testified, he simply read the card and signed it. Legrand further testified that, before he signed the card, Mike Acey stated that, if there were enough cards, it would come down to an election. Foster testified that, before he sighed a card, he was told by the solicitor, Elmer Laird, that the card was for union representation. Foster further testified that Laird also stated that there would be a vote later on.

I reject Respondent's contention that the Eirich, Allen Legrand, and Foster cards should be discounted. Those employees were not advised by the card solicitors, in word or in substance, that the sole or only purpose of the cards they were signing was to obtain an election. As the clear language contained on the cards was not canceled, and as the signers were not led to believe that the cards would be used for no purpose other than to help get an election, the cards are valid, and should be counted.[8]

Finally, the cards signed on January 8, 1989, by Robert Dillen, Howard Kitko, John Kitko, Albert Legrand, and Rick Long are challenged, because they were signed immediately after a meeting of employees, conducted by the Union, which was attended by first-level working Supervisors William Howe, Ken Bandy, and Jim Supenia. While there is evidence that, at that meeting, Supenia spoke, for several minutes in support of the Union there is neither contention nor evidence that the supervisors directly participated in the solicitation of the employees' signatures.

While activities by a supervisor in connection with a union's organizational drive may ''taint'' the validity of signed cards, not every word or action by a supervisor, in support of the Union, will have this effect. Here, the supervisory status of the individuals who attended the meeting was marginal, their participation in the campaign was slight, and they were not involved in soliciting employees to sign cards.[9] I therefore conclude that the cards in question are valid, free of taint, and should be counted.

(3) Bargaining order

In *NLRB v. Gissel Packing Co*.,[10] the Supreme Court held that a bargaining order is appropriate in two situations. The first is in ''exceptional'' cases marked by ''outrageous'' and ''pervasive'' unfair labor practices of ''such a nature that their coercive effects cannot be eliminated by the application of traditional remedies, with the result that a fair and reliable election cannot be had.'' The second is ''in less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes.'' Under *Gissel*, an employer can insist on a secret-ballot election unless he engages ''in contemporaneous unfair labor practices likely to destroy the Union's majority and seriously impede the election.''

In my view, this matter falls into the first category of cases discussed in *Gissel*, those marked by outrageous and pervasive unfair labor practices which destroy the possibility of holding a fair election. Here, from the onset of the organizational drive in December 1988, and for months thereafter, Respondent, from its highest officials to its lowest level supervisors, engaged in repeated threats to close down its operations if the employees selected the Union to represent them. These threats reached, directly, nearly every employee in the bargaining unit. Such threats of closure, repeated, numerous, and widely disseminated, are among the most serious, flagrant, and long-lasting forms of interference with employee rights which act to destroy employee support for a union and the possibility of holding a fair election. In addition, 2 weeks before the election scheduled for March 23, 1989, Respondent discharged 13 union adherents, including those known to be its most active supporters. Thereafter, it repeatedly advised its remaining employees that ''the 13'' would not be back. As urged by the General Counsel, ''it is difficult to imagine any act of management better calculated to chill union support'' than those massive discharges. In view of the egregious nature of Respondent's unfair labor practices, which occurred over an extensive period of time, it is likely that its unlawful conduct will recur.

[8] *Levi Strauss & Co*., 172 NLRB 732 (1968), affd. 441 F.2d 1027 (D.C. Cir. 1970).

[9] See *Boston Pet Supply*, 227 NLRB 1891 (1977).

[10] 395 U.S. 575 (1969).

I conclude that the coercive effects of Respondent's conduct, even allowing for the passage of time, cannot be eliminated by the application of traditional remedies. As a fair and reliable election cannot be held, the authorization cards signed by a majority of the unit employees provide a better test of their desires. The only available and effective remedy for the unfair labor practices committed by Respondent is a bargaining order.

g. *Unilateral wage increase*

The complaint alleges that, in late March 1989, Respondent, without prior notice to the Union, and without having afforded the Union an opportunity to negotiate and bargain about the matter, granted wage increases to certain unit employees. As there is an entire lack of record evidence to support this allegation, it must be dismissed.

h. *The representation case*

The tally of ballots following the election conducted on March 23, 1989, showed that 27 votes were cast for the Union, 30 votes were cast against representation, and there were 19 challenged ballots. The Acting Regional Director sustained the challenges to the ballots of three individuals, and referred for hearing the issues raised by the remaining 16 challenges. In light of my earlier findings that Larry Kanour, Ronald Krise, and Richard Liptak, the safety director and the engineers, should be excluded from the unit, I conclude that the challenges to their ballots should be sustained. In light of my earlier findings that the 13 employees permanently laid off on March 10, 1989, were unlawfully discharged, I conclude that the challenges to their ballots should be overruled, and that those ballots should be opened and counted.

The objections to conduct affecting the results of the election, filed by the Union, generally track the complaint allegations with respect to conduct occurring between the time the petition was filed on January 6, 1989, and the time the election was held on March 23. In light of my earlier findings, that Respondent, during the critical period, repeatedly threatened its employees with a closure of operations if they opted for representation by the Union and, also, during the critical period, discharged 13 employees because of their union activities, I conclude that the objections should be sustained and the election set aside.

2. The *Power II* cases[11]

a. *The strike*

As more fully discussed hereinafter, in early December 1989, Respondent subcontracted the operation of the rock trucks and grader, and the maintenance of that equipment, and permanently laid off six rock truckdrivers. On December 10, at a union meeting, the Power employees voted to strike in protest of that action, and in protest of the discriminatory discharges that had earlier occurred on March 10. On Monday, December 11, the strike commenced, and the Union established a picket line at the entrances to Respondent's facility. In view of my findings, supra, that the March 10 discharges were in violation of Section 8(a)(3) of the Act, and my findings, infra, that the early December layoffs were violative of Section 8(a)(5) of the Act, I find and conclude that the strike was, from its inception, an unfair labor practice strike.

b. *The 8(a)(1) allegations*

On or about December 18, 1989, Frank Zangari, an inspector for the Federal Mine Safety and Health Administration, visited the Power site to conduct an inspection. He was accompanied by striking employee Jim Keith, a duly designated representative of the employees for mine safety purposes. After completing the inspection, Zangari, accompanied by Keith, stopped his vehicle near Respondent's office trailer. Safety Director Larry Kanour, and a mining engineer from the United Kingdom, William McCallister, approached the vehicle. Zangari, in confused and sometimes self-contradictory testimony, variously testified that Kanour and McCallister told him that Keith had no right to be on the mine property, as he was not working, and/or that Keith was ''not employed by the Company.'' The discussion was heated and, eventually, Kanour asked Zangari to speak to Respondent's attorney, Bosch, on the telephone. Bosch told Zangari that, as Keith was a striker, and out on the picket line, Respondent would prefer that he, Zangari, use another employee on his walkarounds. Keith, in his testimony, claimed that, during the confrontation, McCallister stated that he, Keith, was no longer employed by Respondent, and had no right to be on Respondent's property. Keith further testified that he was reinstated on May 5, 1990, immediately following his offer to return to work.

In the General Counsel's view, Respondent, by McCallister, violated Section 8(a)(1) of the Act by informing Keith, a striker, that he was no longer considered an employee. While there is no contention that McCallister is a statutory supervisor, the General Counsel urges that he is an agent. However, there is an entire lack of record evidence showing that this individual had authority to speak for management, actual or apparent. Moreover, in light of the confused state of the evidence as to the wording of the remarks made, I am unwilling to base an unfair labor practice finding on the proffered testimony. I conclude that this allegation must be dismissed.

On December 27, 1989, Respondent, at the scale house, distributed hams to its employees, including striking employees. On that occasion, Mining Engineer McCallister spoke to a group of five strikers, including Randall Eckberg and Bob Ralston. According to Eckberg, who professed to have little memory of the matter, McCallister stated that he was offering contracts if the employees would come back to work. Eckberg further testified that when he said, ''Fine, give me a contract and I'll report to work tomorrow,'' McCallister said that he could not do that at that time. McCallister did not describe the type of contract he was referring to, but did state that, with such a contract, the employees would not suffer the fate of the laid-off rock truckdrivers. Ralston testified that, after McCallister spoke, he told him that he did not know who he was, and that he did not like McCallister's attitude. Ralston told McCallister that ''we should have an ass kicking party and kick him right back to England.''

The General Counsel contends that Respondent, by McCallister, violated Section 8(a)(1) of the Act by offering

[11] The complaint allegations of unlawful conduct in violation of Sec. 8(a)(4) of the Act are entirely unsupported by record evidence, and must be dismissed.

individual contracts to striking employees if they would return to work. I think it is unclear, from the state of the record evidence, just what McCallister was offering. What is clear is that the employees did not know who he was. There is, as earlier found, an absence of record evidence showing that McCallister had authority, actual or apparent, to speak for management. I conclude that this allegation, too, should be dismissed.

The complaint in the *Power II* cases alleges that Respondent violated Section 8(a)(1) of the Act by offering inducements to nonstriking employees to destroy a picket shack and, thereafter, by destroying the picket shack in the presence of nonstriking employees. The General Counsel's sole witness, in support of these allegations, was James Weaver, who, at the time he testified, had suffered a stroke which rendered him totally unable to recall the events in question. In view of Weaver's condition, General Counsel introduced into evidence Weaver's pretrial affidavit, as prior recollection recorded. The affidavit supports the complaint allegations.

While the Board has held[12] that the trier of fact may, in certain circumstances, rely on an affidavit in finding a violation of the Act, despite its hearsay character, the affidavit must be consistent with other extraneous, objective, and unquestionable facts. Such is not the case here, where there is an absence of any other evidence even remotely bearing on the subject allegations. In these circumstances, I am unwilling to base unfair practice findings on the affidavit.

c. *The subcontracting of the operation and maintenance of the rock trucks and graders, and the resultant layoff of six employees*

Early in October 1989, David Mantz, president and sole stockholder of Tire Tec, Inc., which then supplied some 90 percent of Power's heavy equipment tires, approached Respondent's purchasing agent, Dave Semelsberger, about initiating a tire maintenance plan. Mantz had observed an increase in damage to the tires on Respondent's equipment, which he attributed to poor maintenance of haul roads, and to equipment running at excessive speeds on those road. As a tire for a rock truck costs approximately $5000, and as each truck requires six tires, Mantz believed that a maintenance program substantially could reduce Respondent's operating costs. Semelsberger referred Mantz to Treasurer Reed who, in turn, referred him to Les Nicholson, the managing director of Disger, plc and the manager of Crouch Mining.

On October 16, Mantz met with Nicholson, Reed, and other representatives of Power. At this meeting, Power officials suggested that Mantz take over the operation and maintenance of the rock trucks and graders (which are used to free the haul roads from damaging debris). Mantz stated that he had no experience in the mining industry, or in the operation of heavy equipment. However, Nicholson assured Mantz that he need not be concerned with mining; he just had to supply the labor to operate and maintain the heavy equipment. Thereafter, agreement was reached and, on December 6, a contract was signed. Mantz formed a new company, Operators Unlimited, Inc., to engage in this business. Power required that Operators supply 23 employees to work at the Power site, including 18 rock truckdrivers, 2 grader operators, and 3 maintenance employees. Although none of the rock truckdrivers hired by Mantz had ever run a 100-ton rock truck, Mantz was at no time advised that the drivers, or the mechanics, would require specialized training. What training those employees ultimately did receive, on site, came from Atlee Peters, a Power mechanic.

Respondent's onsite chief executive officer, Operations Manager John McBean, was informed of the subcontracting arrangement in November, by Nicholson, and was told that the effective date was December 11. Nicholson instructed McBean to lay off Power's 12 rock truckdrivers, but granted him permission to retain any of them for whom vacancies could be found.

On Friday, December 8, 1989, Respondent permanently laid off six rock truckdrivers, Bob Dillen, Allen Legrand, Tim Gray, Larry Foster, Roy Prentice, and Forrest Shepherd, and invited them to apply for work with Mantz.[13] Respondent transferred to other positions rock truckdrivers Rick Long, Dan Merritt, Dave Miles, Howard Kitko, Edmund Kantowski, and Pete Baughman. McBean testified that, in selecting employees for layoff, he did not consider classification seniority, since the classification was being eliminated. Rather, he considered the suitability of the individual drivers for the available positions, and their past experience.

Reed credibly testified that Respondent entered into the subcontracting arrangement because it anticipated a 10-percent reduction in labor costs and, too, additional savings ''by amalgamating the tires, the operators, the maintenance of those trucks, and . . . the conditions of the road . . . .'' In fact, Reed testified, very substantial savings were realized.

As detailed in the *Power I* cases, Respondent harbored an overwhelming hostility toward the union activities of its employees, and demonstrated a willingness to attempt to thwart those activities by unlawful means, including a massive discharge of known union supporters. In connection with the layoff of the rock truckdrivers, I note that all six laid-off employees were card signers, union supporters, and, concededly, were known to Respondent as prounion.

Respondent's assigned reason for entering into the subcontracting arrangement withstood the considerable scrutiny that it received at trial. It is important, too, to note that, as detailed in the *Power I* cases, Respondent, beginning early in 1988, began a reorganization program designed to bring its business into profitability, in part by reducing operating costs. In this connection, and preceding employee union activities, Power had closed departments, subcontracted portions of its operation, and laid-off affected employees. When, in December 1989, it subcontracted the rock truck and grader operations, it laid-off six known union supporters. However, four of the six drivers who were retained and placed in other positions (Long, Merritt, Miles, and Kitko) were also card signers and union supporters.

While the matter is not free of suspicion, I conclude that the evidence is insufficient to establish that Respondent subcontracted the operation and maintenance of the rock trucks and graders, and selected employees for layoff, for discriminatory reasons. However, as found in the *Power I* cases, Respondent, since January 6, 1989, was under obligation to rec-

[12] *Industrial Waste Service*, 268 NLRB 1180 (1984).

[13] McBean had instructed Mantz to offer employment to the six laid-off drivers. However, as the wage rate offered by Mantz was lower than that previously paid by Power, all six drivers rejected Mantz' offers of employment.

ognize and bargain with the Union as the exclusive collective-bargaining agent of the unit employees. It subcontracted a portion of the unit work, and laid off employees, without notifying the Union or affording it an opportunity to bargain. The decision to subcontract was based, primarily, on a desire to reduce labor costs. In these circumstances, I conclude that, by unilaterally subcontracting unit work, and permanently laying off unit employees, Respondent violated Section 8(a)(5) of the Act.

d. *The refusal to reinstate unfair labor practice striker Robert Ryver*

Respondent operated during the strike, using temporary replacement employees. As strikers returned to work, the replacements were let go. Only one striker, Robert Ryver, was denied reinstatement, for misconduct during the strike, on his unconditional offer to return to work. Ryver had not signed an authorization card, nor worn items containing union insignia to work. While he honored the strike from its inception, he did not join the picket line until mid-January 1990. On March 3, he sought to return.

McBean testified that his decision to deny reinstatement to Ryver was based on the reports he received from security guards, that Ryver had threatened their lives, and the reports he received from certain of the British replacement employees, which he, McBean investigated, that Ryver was following them to work, at 5:30 a.m., with his headlights on. On receiving the latter reports, McBean further testified, he drove one morning, late in December 1989, to the hotel housing the British replacement employees, at 5 a.m. There, he found Ryver, sitting in his pickup truck. A conversation ensued and Ryver told McBean that ''the boys were going to get madder and madder'' and somebody was liable to send him ''home in a box.''

Security guards Shawn Bruner and John Mitchell both testified that, on December 18, 1989, Ryver repeatedly told them that, if Bruner focused his video recorder on Ryver again, neither Bruner nor Mitchell would ''live to see Christmas.'' The security guards filed reports with Power officials. Bruner further testified that, on other occasions, Ryver threatened to follow him home and then ''he wouldn't be so smart,'' and told Bruner that ''someone could be sitting across the hill from us and put a slug between us'' (referring to Bruner and Mitchell).

Ryver, in his testimony, conceded that the foregoing incidents had, in fact, occurred. Thus, he testified that, when he met McBean in the hotel parking lot, at 5 a.m., he told him that the employees were ''mad enough to send you back to England in a box.'' He also testified that he had told the security guards, who were videotaping, that ''if you keep it up, you are not going to see another Christmas.''

Based on the credited and uncontradicted testimony of McBean, I find that Respondent, when it denied reinstatement to Ryver, entertained a good-faith belief that he had engaged in threats to human life and other intimidating conduct. The General Counsel has not shown that the alleged acts of misconduct did not, in fact, occur. Accordingly, I conclude that, in denying reinstatement to Ryver, Respondent did not engage in conduct violative of the Act.[14]

[14] See *Clear Pine Moldings*, 268 NLRB 1044 (1984).

e. *The verbal warning issued to Dennis Webster and the discharge of Albert Legrand*

On Friday, April 13, 1990, strikers Dennis Webster and Albert Legrand went to McBean's office and offered to come back to work. Subsequently, they were advised by McBean that they would be returned to work, after safety training. On the following Monday, April 16, Safety Director Larry Kanour called and instructed them to report to a 1-day safety training program, to be held offsite, on Wednesday, April 18. Neither McBean nor Ranour specifically told the employees when to report for duty. However, as safety training is paid time, employees normally return to their jobs immediately on its completion.

Webster and Legrand attended the mandatory safety class on the designated day. Neither reported for work on the following day. On Friday, April 20, at midday, they went to McBean's office to submit their timecards for the safety training, and to inquire when they should report for duty. McBean asked them why they had not returned to work after safety training. The employees stated that they had not been told when to report and, therefore, they waited at home for a call from Power. McBean said that the employees should have known that they were to report for work on the morning following safety training, as other returning strikers had done. He further stated that he, McBean, would have to take the necessary action. While Webster remained silent, Legrand said that he ''would like to take some action,'' and that he was not going to ''kiss his [McBean's] ass for a job.'' According to the testimony of Wash Plant Manager Jeff Andrews, who witnessed the matter, as Legrand, who was standing, spoke, his structure became rigid and his fists clenched at his sides.

McBean testified that, after consideration, he decided to issue a verbal warning, only to Webster, as that employee had a clean disciplinary record, and to return him to work on the following Monday, April 23. However, as Legrand had previously received verbal and written warnings, including a final warning for excessive absenteeism, McBean decided to discharge him. The April 20 termination letter, to Legrand, cites, as an additional reason for the discharge, the remarks made by Legrand to McBean on that day.

McBean agreed to reinstate Webster and Legrand on their unconditional offers to return to work. They were treated in the same manner as all other returning strikers. For whatever reason, a misunderstanding developed with respect to reporting time, following safety class, a problem which did not arise when other strikers returned. It may be argued that, in disciplining Webster, and discharging Legrand, for their failure to report to work on the morning following safety class, Respondent acted harshly. I believe that it did. However, in the absence of evidence sufficient to show that it acted for discriminatory reasons, the complaint allegations in this regard must be dismissed.

f. *The refusal to rehire Robert Dillen and Allen Legrand*

By mid-May 1990, all of the strikers had returned to work and, thereafter, the picket line was maintained by those who had been laid off or discharged, including laid-off rock truckdrivers Robert Dillen and Allen Legrand. Both Dillen and Legrand had worked as mechanics prior to their April 1989

transfers to positions as 100-ton rock truck operators. Legrand had also worked in the wash plant, as a welder/mechanic.

Dillen and Legrand earlier signed union authorization cards, displayed union insignia at work, and were, concededly, known to Respondent as particularly active in support of the Union. After their layoffs from the rock truckdriver positions, and the commencement of the strike, each was at the picket line, every day, from 5 to 14 hours per day, where they were observed by Respondent's officials.

In the spring of 1989, Dillen began photographing the replacement employees from the United Kingdom, as they operated equipment. In that time period, he was approached by General Foreman Dipko, and Safety Director Kanour, and asked if he was, in fact, taking pictures. Dillen asked them who it was who had told them that. When Dipko and Kanour refused to reveal that information, Dillen said, well, ''I guess I wasn't taking pictures.'' In December 1989, when Dillen was advised by McBean of his layoff, he learned that more junior rock truckdrivers were being retained in other positions. Dillen protested to McBean, who responded, stating, ''Bob Dillen, we're through with you.''

In June 1990, Respondent decided to hire two mechanics to work in the wash plant. Rather than recall any of the laidoff employees, it chose to advertise for new workers. Thus, the following advertisement was placed in the local newspaper:

> MECHANIC: Local coal producer has immediate opening for a mechanic at its preparation plant. Candidate should have demonstrated mechanical and welding skills.

Among the 20 to 30 resumes received by Jeff Andrews, the then wash plant manager, in response to the advertisement, were those of Dillen and Legrand. In addition, Andrews solicited the applications of Michael Shive, and another individual, who had earlier worked at the Power site as employees of a subcontractor.

Legrand was not called for an interview. Andrews and Wash Plant Supervisor Nick Minor did conduct interviews with Dillen, Shive, and four other applicants. In this connection, Andrews testified that Legrand had worked for him at the wash plant for a 4-month period in 1988, and that he, Andrews, had found Legrand's performance to be substandard. In Andrews' view, Legrand lacked the necessary welding and mechanical skills. Legrand, in his testimony, conceded that, while employed at the wash plant, and preceding the advent of the Union, his repeated requests for a pay raise, so as to bring his wage into line with those of other wash plant mechanics, were denied by Andrews. As a result, Legrand testified, he and Andrews ''never got along.''

As noted, Andrews and Minor did conduct an interview with Dillen. They told Dillen that they needed someone to work on the equipment, such as loaders and dozers. Dillen stated that he had worked on that equipment in the past. In response to inquiry, he assured Andrews and Minor that he possessed the necessary welding skills. He was not asked whether he also had electrical skills. In his testimony, Andrews conceded that Dillen was suitable for the open positions, and had, previously, established an excellent work record with Respondent. Moreover, Dillen was the only interviewed applicant with previous experience working on coal mine industry equipment. In fact, Andrews testified, with two available positions, Dillen was his third choice for the openings. Andrews did not know whether or not Dillen possessed electrical skills.

Respondent hired Michael Shive and Robert Passmore. In Andrews' view, Shive, while working onsite in the employ of a subcontractor, had shown himself to be a truly outstanding welder. Passmore, in addition to mechanical abilities, offered electrical skills.

While I accept Andrews' explanation of why he neither interviewed, nor offered a position, to Legrand, as that explanation is somewhat consistent with other record evidence, I cannot accept his explanation of why a position was not offered to Dillen. This individual, concededly, possessed the necessary skills, had compiled an excellent work record and, unlike the applicants who were hired, had previous experience in the mining field, in general and, in particular, with the equipment on which the new employees were to perform repair work. I reject Andrews' claim that he hired Passmore, in part, because of his electrical skills. The want-ad placed by Respondent did not mention electrical skills. Rather, individuals with mechanical and welding skills were sought. Moreover, during the interview process, Andrews did not seek even to ascertain what, if any, electrical skills Dillen possessed.

Respondent has previously demonstrated a total antipathy toward the union activities of its employees, and a willingness to engage in unlawful acts, including mass firings, in its efforts to thwart those activities. It was aware of Dillen's support for the Union and the strike, and had previously questioned him concerning certain of his activities. In explaining its decision to hire Passmore, rather than Dillen, despite Dillen's experience and conceded suitability for the position, Respondent has advanced a reason, electrical skills, which is patently pretextual. In these circumstances, I find and conclude that Respondent refused to rehire Dillen because of his union activities and sentiments, in violation of Section 8(a)(3) of the Act. I also conclude, in light of the credited portions of Andrews' testimony, that the refusal to rehire Legrand would have occurred even in the absence of protected activities, and was, therefore, not violative of the Act.

g. *The subcontracting of the drilling operation and the resultant layoff of two employees*

In November 1990, Respondent subcontracted its drilling work to Wampum, Inc. Unlike the earlier subcontracting arrangement with Operators, Unlimited, under which Power retained ownership of the equipment (rock trucks and graders), Power, as part of the agreement with Wampum, sold its drills.

As the entire driller classification was eliminated due to the subcontracting arrangement, Respondent did not consider classification seniority in selecting employees for the resultant layoff. Of the three drillers, the two most senior, Jeff Beals and Dennis Webster, were laid off. The third driller, Randall Eckberg, was reasgisned to the position of lubeman, a position he had held in the past. All three individuals, Beals, Webster, and Eckberg, had signed authorization cards for the Union and participated in the strike from its inception.

Reed credibly testified that, prior to the subcontracting decision, he estimated that, by subcontracting the drilling work, Power would achieve annual cost savings of $84,680, principally labor cost savings. Nonetheless, before effectuating the subcontracting arrangement, and laying off employees, Respondent neither notified the Union, nor afforded it an opportunity to bargain.

For the reasons stated in my analysis of Respondent's earlier decision to subcontract a portion of its operations, and the effectuation thereof—in that case, the operation and maintenance of the rock trucks and graders—I find and conclude that the evidence is insufficient to establish that Respondent subcontracted the drilling operation, and selected employees for layoff, for discriminatory reasons, in violation of Section 8(a)(3) of the Act. However, I find that, by unilaterally subcontracting this work, and laying off unit employees, Respondent violated Section 8(a)(5) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in certain unfair labor practice conduct in violation of Section 8(a)(5), (3), and (1) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the polices of the Act. Specifically, I shall recommend that Respondent be ordered to recognize and bargain with the Union, in the appropriate unit, the bargaining order to be dated January 6, 1989, the date Respondent received the Union's recognition demand and the approximate date when it embarked on a clear course of unlawful conduct designed to undermine the Union's majority status. I shall also recommend that the election held on March 23, 1989, be set aside, and the petition be dismissed.

It is further recommended that Respondent be ordered to restore the status quo ante by reinstating its rock truck, grader, and drilling operations; to bargain with the Union concerning the subcontracting decisions and the effects thereof; and to reinstate the laid-off employees with backpay.[15]

Finally, it is recommended that Respondent be ordered to reinstate, with backpay, the employees unlawfully discharged on March 10, 1989.

CONCLUSIONS OF LAW

1. Power, Inc. is an employer engaged in commerce, and in operations affecting commerce, within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Mine Workers of America is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening employees with closure of operations and other reprisals if they supported the Union, and by warning them that exercise of their Section 7 rights would be futile, and would result in job loss, Respondent has engaged in unfair labor practice conduct within the meaning of Section 8(a)(1) of the Act.

4. By permanently laying off John Acey Sr., John Acey Jr., Robert Adams, Charles Berg, Larry Blake, Roy Demko, Jesse Howe, Elmer Laird, Ken Noel, Keith Petrosky, Ron Petrosky Jr., Terry Petrosky, and Dave Stephens, on March 10, 1989, because of their union activities, Respondent has engaged in unfair labor practice conduct within the meaning of Section 8(a)(3) of the Act.

5. All full-time and regular part-time production and maintenance employees including oilers, end dump operators, wash plant operators, assistant wash plant operators, partsmen, drillers, loader operators, dozer operators, dragline operators, mechanics, service employees, mechanic operators, electricians, chemists, coal loader operators, scalesmen, purchasing employees, mechanic trainees, operators, welders, utility operators, sample/loader operators, and grader operators employed by Power, Inc. at its facilities located in Clearfield and Center Counties, excluding engineers, the safety employee, office clerical employees, guards, professional employees, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective-bargaining within the meaning of Section 9(b) of the Act.

6. Since January 6, 1989, and at all times material herein, the Union has been, and is now, the exclusive representative of all employees in the aforesaid bargaining unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

7. By refusing, since January 6, 1989, to recognize and bargain with the Union as the exclusive collective-bargaining representative of its employees in the appropriate unit set forth above, Respondent has engaged in unfair labor practice conduct within the meaning of Section 8(a)(5) of the the Act.

8. By unilaterally subcontracting unit work, namely, the rock truck grader and drilling operations, and permanently laying off employees Robert Dillen, Allen Legrand, Timothy Gray, Larry Foster, Roy Prentice Sr., Forrest Shepherd, Dennis Webster, and Jeffrey Beals, without providing the Union with notice and opportunity to bargain about those actions, and the effects thereof, Respondent has engaged in unfair labor practice conduct within the meaning of Section 8(a)(5) of the Act.

9. By refusing to rehire Robert Dillen, because of his union activities, Respondent has engaged in unfair labor practice conduct within the meaning of Section 8(a)(3) of the Act.

10. The strike which commenced on December 11, 1989, was caused by Respondent's unfair labor practices and was, from its inception, an unfair labor practice strike.

11. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

12. Respondent has not otherwise violated the Act, as alleged in the consolidated complaints.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[16]

[15] *Fibreboard Corp. v. NLRB*, 379 U.S. 203 (1964). See also *Lapeer Foundry & Machine*, 289 NLRB 952 (1988).

[16] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Power, Inc., Osceola, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with closure of operations and other reprisals if they support the Union, and warning the that exercise of their Section 7 rights would be futile, and would result in job loss.

(b) Laying off or discharging employees because of their union activities.

(c) Refusing to recognize and bargain with United Mine Workers of America as the exclusive collective-bargaining representative of its employees in the appropriate unit set forth, above.

(d) Unilaterally subcontracting unit work, and permanently laying off employees, without providing the Union with notice and opportunity to bargain about those actions and the effects thereof.

(e) Refusing to rehire employees because of their union activities.

(f) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, recognize and bargain with United Mine Workers of America as the exclusive collective-bargaining representative of all employees in the aforesaid appropriate unit with respect to rate of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Reinstate the rock truck, grader, and drilling operations previously performed by the unit employees.

(c) Offer to John Acey Sr., John Acey Jr., Robert Adams, Charles Berg, Larry Blake, Roy Demko, Jesse Howe, Elmer Laird, Ken Noel, Keith Petrosky, Ron Petrosky Jr., Terry Petrosky, Dave Stephens, Robert Dillen, Allen Legrand, Timothy Gray, Larry Foster, Roy Prentice Sr., Forrest Shepherd, Dennis Webster, and Jeffrey Beals, immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges.

(d) Make the above-listed employees whole for any loss of earnings and other benefits suffered as as result of the discrimination against them. Backpay shall be computed as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest ag computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(e) Remove from its files any reference to the permanent layoffs or discharge, and the refusal to rehire Dillen, and notify the affected employees, in writing, that this has been done.

(f) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports and all other records necessary to analyze the amount of money due under the terms of this Order.

(g) Post at its Oceola, Pennsylvania facilities, copies of the attached notice marked ''Appendix.''[17] Copies of said notice, on forms provided by the Regional Director for Region 6, after being signed by Respondent's representative, shall be posted by it immediately on receipt and maintained for 60 consecutive day in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(h) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the election held on March 23, 1989, in Case 6–RC–10137 be set aside and that the petition be dismissed.

[17] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT threaten employees with closure of operations and other reprisals if they support the Union, or warn them that exercise of their Section 7 rights would be futile, and would result in job loss.

WE WILL NOT lay off or discharge employees because of their union activities.

WE WILL NOT refuse to recognize and bargain with United Mine Workers of America as the exclusive collective-bargaining representative of our employees in the appropriate bargaining unit.

WE WILL NOT unilaterally subcontract unit work and permanently lay off employees without providing the Union with notice and opportunity to bargain about such actions and the effects thereof.

WE WILL NOT refuse to rehire employees because of their union activities.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in Section 7 of the Act.

WE WILL, on request, recognize and bargain with United Mine Workers of America as the exclusive collective-bargaining representative of all employees in the appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, WE WILL embody the understanding in a signed agreement.

WE WILL reinstate the rock truck, grader, and drilling operations previously performed by unit employees.

WE WILL offer to John Acey Sr., John Acey Jr., Robert Adams, Charles Berg, Larry Blake, Roy Demko, Jesse Howe, Elmer Laird, Ken Noel, Keith Petrosky, Ron Petroswky Jr., Terry Petrosky, Dave Stephens, Robert Dillen, Allen Legrand, Timothy Gray, Larry Foster, Roy Prentice Sr., For-

rest Shepherd, Dennis Webster, and Jeffrey Beals, immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges.

WE WILL make the above-listed employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, plus interest.

WE WILL remove from our files any reference to the permanent layoffs or discharges, and the refusal to rehire Robert Dillen, and notify the affected employees, in writing, that this has been done.

POWER, INC.